Supreme Court of the United States

No. 213 October Term, 1925.

READING COMPANY, SUCCESSOR OF PHILADELPHIA & READING RAILWAY COMPANY,

Petitioner,

vs.

JOHN L. KOONS,
ADMINISTRATOR OF LESTER M. KOONS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

BRIEF FOR RESPONDENT
(30.713)

Geo Ross Hull.
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REPORT OF OPINIONS IN THE COURTS BELOW

The opinion of the trial Court, Common Pleas of Dauphin County, Pennsylvania overruling petitioner's motion for judgment of non pros., is reported in John L. Koons, Administrator of Lester M. Koons, vs. Philadelphia & Reading Railway Company, 26 Dauphin County Reports 234; the opinion of the Supreme Court of Pennsylvania, affirming the judgment of the Court below, is reported in 281 Pa. 270; 126 Atlantic 381.

The opinion of the trial Court, Common Pleas of Dauphin County, Pennsylvania, in the suit brought in 1916 by the surviving parents in their own right, sustaining defendant's motion for judgment n. o. v., is reported in 23 Dauphin County Reports 91; the opinion of the Supreme Court of Pennsylvania, affirming the action of the Court below in entering judgment n. o. v., is found in 271 Pa. 468; 114 Atlantic 262.

STATEMENT OF THE CASE

This is an action in trespass brought February 6, 1922, in the Court of Common Pleas of Dauphin County, Pennsylvania, to No. 222 January Term, 1922, against the Philadelphia & Reading Railway Company, by John L. Koons, administrator of Lester M. Koons, deceased, for the benefit of the surviving parents under the Federal Employers' Liability Act.

The single question involved is the construction of Section 6 of the Act of Congress of April 22, 1908 c. 149, as amended by the Act of April 5, 1910 c. 143 (35 Stat. 66; 36 Stat. 291; U. S. Compiled Stat. 1916, Section 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued".

On April 22, 1915, Lester M. Koons, while in the employ of the defendant and engaged in unloading parts of a wrecked freight car shipped from Gettysburg, Adams County, Pennsylvania, to Rutherford Yards, Dauphin County, Pennsylvania, sustained injuries from which he died the next day.

Thereafter on April 20, 1916, John L. Koons and Malinda Koons, the surviving parents of Lester M. Koons, brought an action of trespass against the Philadelphia & Reading Railway Company in the Court of Common Pleas of Dauphin County, Pennsylvania, and entered to No. 410 June Term, 1916, to recover damages for his death. This action was instituted under the statute in force in the State of Pennsylvania. The plantiffs filed their statement of claim on September 19, 1916. This statement did not aver any cause of action or plead any facts within the Federal Employers' Liability Act. To this statement no affidavit of defense was filed. (R. 5-6)

Because of the congested state of the trial list and of serious illness of plaintiff's counsel, the cause was not brought to trial until May, 1917. Then, for the first time

the plaintiffs were advised, through the defense interposed by the defendant, of its contention that the deceased met his death while engaged in employment relating to interstate commerce (R. 4).

At this time the plaintiffs were precluded from moving to amend with respect to the parties plaintiff so as to bring the action within the Federal Employers' Liability Act, as such an amendment, under the state of the pleadings, would have introduced a new cause of action.

The jury found as a fact that the deceased had not been working about an instrumetality engaged in interstate commerce at the time of his injury, and on May 19, 1917, returned a verdict in favor of the plaintiffs. The defendant immediately filed a motion for judgment n. o. v., which motion was argued in October, 1917, but no decision handed down by the trial court until April 3, 1920, when the defendant's motion was sustained in an opinion reported in 23 Dauphin County Reports 91. Thereupon, on September 29, 1920, the defendant had judgment entered in its favor, from which action the plaintiffs on September 30, 1920, appealed to the Supreme Court of Pennsylvania. On July 1, 1921, the Supreme Court of Pennsylvania affirmed the action of the court below in directing the entry of judgment n. o. v. for the defendant (R. 6), in an opinion reported in 271 Pa. 468; 114 Atlantic 262.

Thereupon letters of administration on the estate of Lester M. Koons were, on the 23d day of September, 1921, duly granted to John L. Koons, plaintiff herein. Prior to this time no letters in said estate had been granted to anyone. On February 6, 1922, the plaintiff, as administrator of said estate, brought the action, now under review, for the benefit of the surviving parents, John L. Koons and Malinda Koons, under the Federal Employers' Liability Act of April 22, 1908, as amended by the Act of April 5, 1910 (U. S. Compiled Statutes, 1916, Sec. 8662). Plaintiff's statement was filed the same day. (R. 6).

Approximately a year later, on April 2, 1923, the defendant presented its petition praying for judgment of non pros, averring therein that the instant action accrued to the plaintiff at the time of the death of Lester M. Koons

and, a period of more than two years having elapsed between the date of the death and the bringing of the suit, the right to maintain the action was lost, under Section 6 of the Act heretofore referred to. (R. 6).

Plaintiff in answering this rule averred that the action was commenced within two years from the date of the appointment of the administrator, and prayed that the rule be discharged (R. 2,3,4,5). After argument, the Court of Common Pleas discharged the defendant's rule and refused its motion for judgment of non pros., holding that the limitation contained in the Act of Congress did not begin to run until the appointment of the plaintiff as administrator, and that the action was commenced within the statutory period after such appointment (R. 5).

When the case came to trial on the merits, plaintiff and defendant stipulated of record that, subject to the legal question involved, under the exception noted, with the right of appeal reserved, a verdict should be taken in favor of the plaintiff and against the defendant in the sum of $2,510. (R. 15). Accordingly a verdict was rendered in the amount stated, upon which, on October 23, 1923, judgment was entered (R. 15). From this judgment an appeal was taken to the Supreme Court of Pennsylvania, which Court on October 6, 1924, (reported in 281 Pa. 270; 126 Atlantic 381), affirmed the judgment of the Court of Common Pleas. (R. 19). On October 25, 1924, the Supreme Court of Pennsylvania refused a petition for reargument. (R. 23).

On the petition of Reading Company, as successor of the Philadelphia & Reading Railway Company, entered to No. 748 October Term, 1924, your Honorable Court on January 5, 1925, granted a writ of certiorari to the Supreme Court of the State of Pennsylvania (R. 25).

ARGUMENT

The present action was begun over two years after the death of the defendant's employee but within two years of the appointment of the plaintiff as administrator of his estate.

A single question alone is involved. When did the cause of action accrue under Section 6 of the Federal Employers' Liability Act of April 22, 1908, as amended by the Act of April 5, 1910 (U. S. Compiled Statutes, 1916, Sec. 8662), which reads as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued".

Did the two year limitation run from the date of death of the employee or from the date of the appointment of the plaintiff as administrator by his estate?

The Common Pleas Court of Dauphin County held that the two year limitation did not begin to run until the appointment of the plaintiff as administrator (R. 5). The Supreme Court of Pennsylvania, in affirming the trial court, followed the construction placed upon the limitation clause in question by the Circuit Court of Appeals for the Third Circuit, in *Guinther, Administratrix* vs. *Philadelphia & Reading Railway Company, 1 Fed. (second series) 85 (1924)*, and by the Circuit Court of Appeals for the First Circuit in *American Railroad of Porto Rico* vs. *Coronas, 230 Fed. 545, (1916)*. These two cases, the respondent respectfully submits, are well considered, directly in point and therefore conclusive of the question here raised.

The principle of these two cases was also followed by the Supreme Court of Texas in *Bird* vs. *Ft. Worth & R. G. Ry Co., 207 S. W. 518 (1918)*, and by the United States District Court for the Western District of New York in *Kierejewski* vs. *Great Lakes Dredge & Dock Company, 280 Fed. 125 (1921)*.

In the *Guinther case, supra.*, the plaintiff, administratrix of the estate of William Guinther, her deceased husband,

brought suit under the Federal Employers' Liability Act to recover damages for his death occurring August 1, 1916, while in the employ of the defendant railroad company. The plaintiff was not appointed administratrix until September 21, 1922. Suit was instituted in the United States District Court for the District of New Jersey on October 7, 1922—over six years after the death. The defendant's motion, made in the District Court for judgment under the pleadings, was granted. On writ of error to the Circuit Court of Appeals, Third Circuit, this judgment was reversed with directions to restate the complaint and proceed according to law.

In the *Coronas case, supra.*, Pedro Didricksen died intestate December 8, 1908, from injuries sustained November 30, 1908, while employed by the defendant in switching and coupling cars on its railroad. Letters of administration were granted to the plaintiff on May 12, 1914. The action was brought by the administrator under the Federal Employers' Liability Act, December 17, 1914—over six years after the date of the death, but shortly after the appointment of the administrator. The defendant filed a demurrer to the declaration, setting forth that the action was barred under Section 6 of the Act. This demurrer was over-ruled and there was a verdict for the plaintiff. On appeal to the Circuit Court of Appeals for First Circuit, the judgment was affirmed by Bingham, Circuit Judge, in an elaborate opinion exhaustively reviewing the authorities.

As this opinion concisely sets out the legal principles here controlling and the many authorities supporting the same, we extensively quote from it page 547, et seq.:

AMERICAN RAILROAD COMPANY OF PORTO RICO VS. CORONAS—OPINION IN PART.

"It is to be noted that the statute does not require that the action shall be brought within two years from the death, but within two years from the time the cause of action accrued. It is also to be noted that the action is not for the occurrence out of which the death arose, but

for the pecuniary damage to the beneficiary due to the death; so that, in no event, could the cause of action arise until after the death, or be said to exist so that the statute could run until after that time. We may therefore assume that the statute, so far as this cause of action is concerned, did not begin to run until after death had ensued.

"It is a general rule of law that where a cause of action arises as in this case, after death, it is considered as accruing, for the purpose of the running of the statute, only from the time when there is some one in existence capable of suing, and if no one but the administrator can sue, that the statute does not begin to run until administration is granted. This principle was announced at an early day. The leading English case on the subject is Murray, Administrator *v.* East India Co., 5 Barn. & Ald. 204, which has been very generally followed in this country. It was an action by an administrator, with the will annexed upon a bill of exchange made payable to the testator, but accepted after his death. The acceptance of the bill and the day of payment were more than six years before suit was brought, but administration was first taken out less than six years before, and it was held that the statute of limitation began to run from the granting of the letters of administration, and not from the time the bill became due, as the cause of action did not accrue until there was a party capable of suing.

"In Sanford *v.* Sanford, 62 N. Y. 553, 554, the court says:

> " 'The term 'cause of action' includes, not only the right proper, but the existence of a person by or against whom process can issue. A cause of action cannot accrue or exist unless there is a person in esse against whom an action can be brought and the right of action enforced. It is well said that 'when there is no person to sue there can be no laches.' A case literally within the words of the statute is without its spirit when it is impossible to maintain a suit at law. Richards *v.* Maryland Ins. Co., 8 Cranch, 84 (3 L. Ed. 496). It is directly adjudged that the statute does not commence to run against the representatives

> of a deceased creditor upon an obligation incurred, or debt becoming due after his decease, until administration is granted upon his estate, there being no cause of action until there is a party capable of suing. Murray *v.* East India Co., 5 Barn. & Ald. 204; Bucklin *v.* Ford, 5 Barb. (N. Y.) 393; Cary *v.* Stephenson, 2 Salk. 421. In order to put the statute in motion there must not only be a person in esse to sue, but a person to be sued. Davis *v.* Garr, 6 N. Y. 124 (55 Am., Dec. 387); Levering *v.* Rittenhouse, 4 Whart. (Pa.) 130, per Nelson, J., Wenman *v.* Mohawk Ins. Co., 13 Wend. (N. Y.) 267 (28 Am. Dec. 464); Jolliffe *v.* Pitt, 2 Vern, 694; Douglas *v.* Forrest, 4 Bing. 686; Benjamin *v.* De Groot, 1 Denio (N. Y.) 155.'

"In Collier *v.* Goessling, 160 Fed. 604, 611, 87 C. C. A. 506, Judge Lurton, speaking for the Circuit Court of Appeals for the Sixth Circuit, said:

> "'To start the running of a statute of limitation there must be some one capable of suing, some one subject to be sued, and a tribunal open for such suits.'

"In Fulenweider's Case, 9 Ct. Cl. (U. S.) 403, it was sought to defeat a contract claim against the government on the ground that it was barred by the statute. The Act of Congress of March 3, 1863 (12 Stat. 765, c. 92 (Comp. St. 1913 sec. 1147), provided:

> "'That every claim against the United States, if cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues.'

"It seems that the contractor died before the claim accrued, the services rendered having been completed June 1, 1861. The petition was not filed until March 13, 1873, but administration was granted December 19, 1870, and it was held:

"' It is a well-settled rule that if, when the right of action would otherwise accrue and the statute (of limitations) begin to run, there is no person in existance who is qualified to sue upon that right, the statute does not begin to run till there is such a person. Angell on Lim. Secs. 54-63. For this claim none but a personal representative * * * could sue; and there was no personal representative until December 19, 1870, when the statute began to run, less than three years before this suit was brought.'

* * * * * * * * * * * * * * *

"In Andrews *v.* Hartford & New Haven R. R. Co., 34 onn. 57, the question was, for all practical purposes, iden-cal with one here presented. The Connecticut statute rovided in substance that, where a life was lost by reason the negligence of a railroad company, such company ould be liable to pay damages not exceeding $5,000 nor ss than $1,000, to the use of the executor or adminis-ıtor, to be recovered by him in an action for the benefit the husband or widow or children or heirs of the de-ased person, as the case might be, and the court, on ge 59, said:

"'The cause of action here would have been perfect on the happening of the death, and under section 546 would have been barred at the end of one year from the happening of that event, if an ordinary case, or there had been an executor. But it is a rule of law reognized by the court in Hobart *v.* Connecticut Turnpike Co., 15 Conn. 145, that a cause of action, accruing to an administrator after the death of the intestate, is not complete, and does not arise and exist, so that the statute of limitations can begin to run upon it, until an administrator is appointed who can bring suit. And the Legislature seem to have had that rule in view when they enacted the statute: for they did not say that the action should be barred unless commenced within one year from the death, or the happening of the events for which it is given, but unless 'commenced within one year after the cause of action shall have arisen.' Inasmuch then, as under a well-

> settled rule no cause of action can arise and exist in favor of an administrator until he comes into existence as such and this suit was brought within one year after the plaintiff received his appointment, it was not barred, and the court below erred in sustaining the demurrer.'

"In Sherman *v.* Western State Co. 24 Iowa, 515, the action was brought by an administrator under the Iowa statute, charging that his intestate's death was occasioned by the negligence of the defendant. In this case all the judges were agreed that, if the statute gave a new cause of action for the death, the right of action would not accrue and the statute of limitations would not attach until an administrator was appointed. The members of the Court, however, where not agreed as to whether the statute gave a new cause of action for the death, but the majority was of the opinion that, whether the statute gave a new cause of action for the death or not, inasmuch as the death was substantially instantaneous, a right of action did not accrue to the plaintiff's intestate in his lifetime, and, this being so, the statute of limitation did not attach and begin to run until an administrator was appointed.

"In the Circuit Court of the United States for the Southern District of Iowa, Judge Shiras, in Ewell, Administratrix, *v.* Chicago & N. W. Ry. Co. 29 Fed. 57, reviews the decision in Sherman *v.* Western Stage Co., supra, and, among other things, says:

> " 'If, however, the statute is to be construed to create, in favor of the estate, a cause of action other and distinct from that accruing to the person injured, then the question to be determined is: When does the statute begin to run as against such an action? The usual rule is that the statute begins to run when the right of action accrues; and, unless otherwise provided in the statute, the right of action is not deemed to have accrued until there is a person authorized to prosecute the same.'

"In Kennedy *v.* Burrier, 36 Mo. 128, 130, the Missouri statute (R. C. 1855 p. 648, sec. 2), which the court had

under consideration, did not give a right of action to the personal representative for the wrongful killing of another, but provided that the suit should be brought (1) by the husband or wife of the deceased or (2) is there be no husband or wife, or he or she fail to sue within six months, then by the minor child or children of the deceased; and it was further provided (section 6) that "every action instituted by virtue of the preceding sections of this act shall be commenced within one year after the cause of action accrued." The widow failed to bring suit within six months after her husband's death, and the plaintiff, a minor child, brought suit within a year after the six months had elapsed within which the widow could have sued, but more than a year after the death. And the court held that, inasmuch as the widow could have brought suit immediately following the death of her husband, the cause of action accrued and the statute began to run at and from that date. In discussing the question the court said:

> " 'When, then, did the cause of action accrue? We think the cause of action accrued whenever the defendant's liability became perfect and complete. Whenever the defendant had done an act which made him liable in damages, and there was a person in esse to whom the damages ought to be paid, and who might sue for and recover the same, then clearly the cause of action had accrued as against him. When, then, did the liability take place? Evidently at the death of Kennedy. The defendant at that time had done the whole wrong complained of, and there was a person in esse—to wit, Kennedy's widow—entitled to receive and empowered to sue for damages. Then the cause of action clearly accrued at the death of Kennedy, and the statute commenced running from that time.'

"In Crapo, Administratrix, *v.* City of Syracuse, 183 N. Y. 395, 76 N. E. 465, the Code of New York provided for an action by an executor or administrator to recover damages for a wrongful act or neglect resulting in death, and required that the action, when brought against a city having a population of 50,000 or more should be "commenced within

one year after the cause of action therefore shall have accrued," and that "notice of intention to commence such action and of the time and place at which the injuries were received" should be "filed with the counsel to the corporation, or other proper law officers thereof within six months after such cause of action shall have accrued." The notice was filed 18 months after the death and within less than 2 months of the appointment of the administratrix. Action was commenced within 20 months after death and within 5 months after the appointment. If the action accrued at the death, and not when administration was granted, the notice was not seasonably given and the action was not seasonably commenced. O'Brien, J., discussing the question said:

> " 'The notice which the statute requires to be served within 6 months after the cause of action has accrued must contain a statement that the party giving notice intends to commence an action. The absence of such a statement vitiates the notice. Curry *v.* City of Buffalo 57 Hun. 25 (10 N. Y. Supp. 392). Who is to give the notice? It is very obvious that inasmuch as no one can bring such an action except a personal representative of the decedent the notice must come from him, and of course he cannot give any such notice until his appointment. A notice served by a stranger, or any one else except a personal representative of the deceased, who alone is entitled to bring the action, would be clearly insufficient, and the defendant could treat it as a nullity. These considerations, that are fairly deduced from a reading of the statute, and other statutes in pari materia, point clearly to the conclusion that the cause of action does not accrue until the personal representative of the decedent has been duly appointed.'

'In the opinions delivered in the above case, reference is made to the decision in Barnes *v.* City of Brooklyn, 22 App. Div. 520, 48 N. Y. Supp. 36, as containing a correct statement of the rule of law here involved. In that case Mr. Justice Bradley said:

> 'The alleged cause of action in question resulted from the death of the plaintiff's intestate. It did not accrue

during his life, and until letters of administration were granted to the plaintiff there was no person in existence capable of bringing an action for the alleged cause. While the right of action was given by the death of the plaintiff's intestate, for the alleged cause of the death, no cause of action could accrue to any party until the appointment of his personal representative. The creation of that relation, therefore, would reasonably seem to be essential to the accruing of a cause of action. And such is the recognized import of the term. See the definition of 'accrue' in Burrill's Law Dictionary. In Murray *v.* East Indian Company, 5 Barn. & Ald. 204, it was held that a cause of action upon a bill of exchange, payable to the testator and accepted after his death, did not accrue until his personal representatives came into existence by taking letters of administration. And the Court of King's Bench, by Abbott, C. J., there said: 'Now, independently of authority, we think that it cannot be said that a cause of action exists, unless there be also a person in existence capable of suing.' The leading case in this state upon the subject is Bucklin *v.* Ford, 5 Barb. (N. Y.) 393, where the defendant was charged with the conversion of personal property of the estate of the plaintiff's intestate after his death. It was there held, as in the Murphy Case, supra, that the cause of action could not accrue until there was some person in existence capable of suing. Many cases are there cited in support of that rule. This proposition and the Bucklin Case are recognized, approved, and adopted in Everitt *v.* Everitt, 41 Barb. (N. Y.) 393, Dunning *v.* Ocean National Bank, 6 Lans. (N. Y.) 297, Id., 61 N. Y. 497, 503 (19 Am. Rep. 293), Sanford *v.* Sanford, 62 N. Y. 553, 555, Halsey *v.* Reid, 4 Hun, 778, and Cohen *v.* Hymes, 64 Hun, 56 (18 N. Y. Supp. 571). The only modification of this doctrine is found in the provisions of section 392 of the Code of Civil Procedure. Those provisions have no application to the present case.'

"In Louisville & N. R. Co. *v.* Sanders, 86 Ky. 259, 5 S. W. 563, it appeared that the statutes of Kentucky provided

that, "if the life of any person or persons is lost or destroyed by the willful neglect of another person, * * * the widow, heir or personal representative of the deceased shall have a right to sue * * * and recover punitive damages for the loss" (Gen. St. Ky. c. 57 sec. 3); that an action for an injury to the person "shall be commenced within one year next after the cause of action accrues" (chapter 71, art. 3, sec. 3); and that "if a person entitled to bring any of the actions mentioned * * * was, at the time the cause of action accrued, an infant, married woman, or of unsound mind, the action may be brought within the like number of years after the removal of such disability" (chapter 71, art. 4, sec 2). The deceased was killed in February, 1880. He left minor children, but no widow. Administration on his estate was taken out in March, 1880. The action was brought in April, 1885, by the minor children, more than five years after the death. It was held that the action must be brought within one year from the time the cause of action accrued, and that the statutory provision in behalf of the infant heirs was operative only where there was no person in esse, as a widow or administrator, who could sue. The court said:

> "The statute says that the suit shall be brought within a year after the cause of action accrues, and not thereafter. Whenever a party has done an act which makes him liable in damages, and his liability is complete, and there is one in esse who can sue therefor and recover, the cause of action has certainly accrued as against the defendant. * * * when Sanders was killed the wrong was done. When the administrator qualified there was a person in esse who had the right to sue for, recover, and receive the entire damages, leaving no longer in existence the cause of action. The statute then began to run not only against him, but against the cause of action.'
>
> * * * * * * * * * * * * * *

"In view of the well-recognized rule heretofore pointed out as to when a right of action accrues—which Congress must have had in mind when enacting the present law—and

in view of the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that, in the enactment of the present law, Congress declined to adopt such a limitation, and fixed the period from the time the action accrued, we are of the opinion that the proper construction of the statute is that the right of action did not accrue, so that the limitation attached, until the administrator was appointed, and that the the demurrer was properly overruled."

* * * * * * * * * * * * * * *

American Railroad Company of Porto Rico vs. *Coronas, 230 Federal 545.*

THE QUESTION HERE RAISED HAS NEVER BEEN PASSED ON BY THIS COURT.

The petitioner, in its argument, page 9, admits that the precise question here in controversy has never been directly passed upon by your Honorable Court. However, it is there argued that in *Missouri, Kansas & Texas Ry. Co.* vs. *Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann Cas. 1914 B, 134,* this court assumed that the statute began to run from the date of death and not from the time of the issuance of letters on the estate of a decedent. It is submitted that the question as to when the cause of action accrued under the statute was not in issue or determined in the Wulf case. There the plaintiff, in her individual capacity instituted suit on January 23, 1909, to recover for the death of her son who was killed on November 27, 1908. On January 4, 1911, or more than two years after the date of the death, the plaintiff took out letters of administration on his estate and amended her pleadings by changing the name of the party plaintiff from Sallie C. Wulf to Sallie C. Wulf, Administratrix. Aside from the capacity in which the plaintiff assumed to bring her action, there was no substantial difference between her original and amended pleadings.

This court merely decided that the action under the Employers' Liability Act had been brought within two years

of the death, since the original petition pleaded injuries resulting in death while engaged in interstate commerce, and the cause of action is to be determined from the petition as originally filed and not from the capacity in which the party plaintiff sued. Therefore the amendment of the name of the party plaintiff was a mere change of form and not of substance, since it set up no different state of facts as the ground of recovery. This is far from holding, even inferentially, that the cause of action accrued at the time of death. This question was not in the Wulf case, because a suit within the purview of the statute had theretofore been brought within the two year period, requiring an amendment only as to a formal matter relating to the capacity of the party plaintiff.

The Wulf case was cited in both the Coronas and Guinther cases, supra, in support of the same contention here made by the present petitioner. However, in both of these cases, the contention was over-ruled. In the Coronas case the court said, page 553:

> "the question as to when the right of action under the statute accrued was not discussed or determined. The point decided was that, if the two years' limitation within which an action could be brought had terminated prior to the time the plaintiff asked leave to appear as administratrix, the desired amendment would not be the introduction of a new cause of action."

and a similar conclusion was reached in the Guinther case where it was said, page 87:

> "It is true that there are cases here and there that do so hold (that the cause of action accrues at death), but the Supreme Court has not gone so far, and by the great weight of authority, we are constrained to hold that under this statute the cause of action does not accrue until the appointment of a personal representative of the deceased who is capable of suing."

An amendment, merely expanding or amplifying that which was pleaded in support of a cause of action already

asserted, relates back to the commencement of the action and is not affected by the intervening lapse of time; but an amendment, introducing a new or different state of facts upon which recovery is predicated, is the equivalent of a new suit against which the statute will run. This is the controlling principle of the Wulf case and the other cases cited by the petitioner. However, as suggested by Circuit Judge Davis in the Guinther case, supra, page 87,when overruling a contention similar to the one here made by the respondent:

> "This is different from holding that, when there is nothing which a pleading may expand and to which 'it relates back,' the cause of action accrues at death, so as to start the running of the statute of limitations, before the appointment and qualification of a personal representative."

In view of the above it is respectfully submitted this court neither assumed nor decided in the Wulf case that the cause of action under the statute in question accrued at death.

The act under consideration is a remedial statute and as such should be liberally construed. However, it needs no liberal construction to support the judgment of the court below. Apt language providing that the limitation should run on the death of the injured party, as in Lord Campbell's Act upon which the act in question was modeled, would naturally have been used, if such had been the intention of Congress. If the petitioner's contention is correct, why use a phrase which on its face is manifestly ambiguous and productive of litigation when a simple, plain, unambiguous phrase used in statutes in many jurisdictions is ready at hand. The refusal of Congress to follow the phraseology of Lord Campbell's Act is therefore most significant. We must conclude that Congress in using the phrase "cause of action accrued" had in mind numerous decisions relating to limitation of actions herein referred to, establishing the principle that a cause of action is not complete until there is a person in existence capable of suing or being sued, until which time the statute does not run; or stated in other words, a cause of action includes not only a right proper but

the existence of a person by or against whom the process can issue.

This is the principle of the old English case of *Murray Admr.* v. *East India Company, 5 Barn. & Old. 204*, generally followed in this country by both the state and Federal courts. The early application thereof in Pennsylvania is found in the case of *Levering* v. *Rittenhouse, 4 Wharton, 120 (1839)*, where this court held that if a surety pays the debt of his principal after the death of the latter, and when no letters of administration have been taken out upon his estate, the statute of limitations does not begin to run until letters of administration are taken out. In reaching this conclusion Mr. Justice Kennedy for the Supreme Court of Pennsylvania on page 139 said:

> "But if Joseph was dead, at or before the time his father paid this money, and no letters of administration were ever taken out upon his estate, then the debt remained in force at the time of the declaration made by the father: because, there never having been any person such as an executor or administrator, in being, of whom this money, which had become a debt against the estate of Joseph, could be demanded, or who could be sued for it, the statute of limitations never could be said to have commenced running, and consequently could form no bar. It is only where the creditor may, and has a right to sue, that the statute commences running; but, as soon as that moment shall have arrived, it commences, and nothing can interrupt or prevent its running afterwards. See Stanford's Case, (5 Co. 123,) cited also in Saffyn *v.* Adams (Cro. Jac. 60-1,) which see also. Cary *v.* Stephenson, (Salk. 42; S. C. nom. Curry *v.* Stephenson, Carthw. 335; Skin. 555). Hickman *v.* Walter, (Willes Rep. 29). The East India Company, *v.* Murray's Admr. (5 B. & A. 204.) Geiger *v.* Brown, (4 M'Cord, 423)."

The case of Levering *v.* Rittenhouse, supra, was cited with approval in *Riner Admr.* v. *Riner Admr., 166 Pa. 617*, being an action brought by an administrator to recover money paid by an insurance company to a person who had no in-

surable interest in the life of plaintiff's intestate. Here again it was held that the statute of limitations began to run only from the date of granting of letters of administration to the plaintiff, and that in such cases the fact that there was gross laches in taking out letters of administration does not defeat the right of action.

Again in *Marstellar* v. *Marstellar, 93 Pa. 350* the Supreme Court of Pennsylvania said, page 354:

> "The statute does not begin to run until a right of action is complete. A cause of action does not exist unless there be a person in existence capable of suing or being sued."

citing Murray *v.* East India Company, supra, and other cases. The same rule is also followed in *Appeal of Amoles Administrators 115 Pa. 356.* Many other cases illustrating the application of this rule in statutory actions for death have heretofore been considered in the Coronas opinion.

Since under the act in question the suit to recover damages for death must be brought in the name of the personal representative of the deceased: *American R. R. of Porto Rico* v. *Birch 224 U. S. 547; St. Louis S. F. & T. R. R. Co.* v. *Seale 229 U. S. 156;* the relevancy of the above decisions to the question here at issue is apparent. Clearly, under the decisions heretofore quoted, until an administrator in the instant case was appointed no cause of action accrued.

The appellant in its argument attempts to limit the principle of the Murray case and the decisions following it to actions on contract, based upon valid consideration, where the debt sued for is due the estate of the deceased. We submit that these matters are merely incidental and are not controlling in the application of the rule. Whether the action is in assumpsit or trespass; for the benefit of an estate or certain specified persons is not material. A party indebted to an estate on a contract accruing after death is just as much prejudiced by delay in the bringing of a suit against him as the defendant in this case. Any interested party under the law may proceed for the appointment of a personal representative. The real question in any event

is whether or not there is a person in existence capable of suing or being sued. If there is not, the cause of action is incomplete and will not become complete or accrue until a person capable of instituting the action is raised. Whether assumpsit, or trespass under the Federal Act in question, until the appointment of an administrator there is no person capable of suing or guilty of laches in not suing. The effect of the doctrine of the Wulf case on this question we have heretofore discussed.

The petitioner in its argument, page 14, further suggests that the Federal Act in question is more than a statute of limitation because under it lapse of time not only bars the remedy but destroys the liability, citing in support thereof certain cases including *William Danzer & Co.* vs. *Gulf & Ship Island R. R. Co.*, decided June 8, 1925,——U. S.——, 69 L. ed. 720, 721. The respondent takes no exception to this familiar principle of law long applied to statutory causes of action for death by wrongful acts, including those arising under the Federal Employers' Liability Act. Such a statute is an offer of an action on condition that it be commenced within the time specified therein. However, the act itself fixes the limitation of two years from the date the cause of action accrues, and the cases heretofore cited are controlling in establishing the respondent's contention that the cause of action does not accrue until the appointment of the administrator.

The Petitioner argues (page 22) that "so far as the defendant is concerned, its liability for negligence accrued on the day of the unfortunate accident which resulted within a few hours thereafter in the death of its employe, at which time the surviving parents, the real parties in interest, sustained their loss." In answer to this we submit that no action under the statute could properly accrue until the death, and when the death occurred manifestly no party was in existence authorized to sue. Thus a situation was created in exact accordance with the principle of the Murray case supra. If it was in the power of the surviving father to take out letters, as suggested by the Petitioner, it was also within the power of the Petitioner to force the taking out of these letters, if it so desired, and any delay in so doing, as decided in the cases heretofore cited, does not defeat the action.

To the statement filed in the first suit brought by the surviving parents under the state law, no affidavit of defense was filed. It was more than two years after the date of death before this first case came to trial. Not until then did the plaintiffs learn of the defendant's contention that the deceased, at the time the injuries were sustained, was engaged in interstate commerce. Now the Petitioner suggests that the plaintiffs, instead of amending the original action by substituting the administrator as plaintiff in place of the surviving parents, elected to stand on the suit as brought and therefore the present action is barred.

In reply thereto the respondent submits that it is to plaintiff's statement alone and not to the name of the party plaintiff, to which we look for the cause of action: *Hogarty v. P. & R. Ry. Co. 255 Pa. 236; Seaboard Air Line Ry. Co. v. Renn, 241 U. S. 290; Atlantic Coast Line* vs. *Burnette, 239 U. S. 198.* The statement filed in the suit by the surviving parents—printed at the end of this argument, page 23, and before the Supreme Court of Pennsylvania in both appeals—was under the statute in force in Pennsylvania and did not plead the Act of Congress nor any facts bringing the case within said act, as there was nothing therein indicating that the employer was operating a line of railroad from one state to another, or that the deceased, at the time the injuries were sustained, was engaged in interstate commerce. Therefore, under the cases last cited the plaintiff could not so amend at the first trial, since the two year limitation has already run, and a new cause of action would have been introduced. The Hogarty case was decided by the Supreme Court of Pennsylvania in October, 1916, and it was under the doctrine of this case that no attempt was made to amend or would have been permitted.

The petitioner also argues that to sustain this judgment would work a hardship on it. The respondent's statement of the case shows that the delay was mostly on the part of the defendant and that the plaintiffs have diligently pressed their rights. Truly it would be a travesty on justice if the petitioner by the concealing of its defense, which was peculiarly within its own knowledge, until over two years after the death, could then escape all liability by pleading a remedial statute. The defendant kept silent for

two years—if not actually misleading the plaintiffs—while the first action was pending, when a word from it and the plaintiffs could have perfected their rights. It is true that the petitioner was within its rights in thus acting, but such conduct has a bearing on the hardship argument now advanced by it. The distinction between interstate and intrastate movements is subtle and refined. The railroad alone possesses the facts on which depends the choice of actions, either under the state law or under the Federal law. If the railroad chooses to keep silent, as in this case, it escapes all liability, should the plaintiff be so unfortunate as to make the wrong guess, unless the well settled rule, that a right of action does not accrue until there is a party in being capable of suing, is recognized.

Under petitioner's contention as to the construction of Section 6 of the Act in question, the deceased employee in the instant case might have left a child of tender years as his sole survivor and, although the Employers' Liability Act was passed for the protection of that child, laches would be imputed to it and all right to recover damages lost, should no suit be instituted on the infant's behalf within two years from the date of death, even though it had no guardian to protect its interests and no personal representative of the deceased had been raised. Under a remedial statute how can it be said that the defendant's liability to answer in damages to this minor child had become perfect and complete, when there was no person in existence to whom the damages can be paid or who was empowered to sue for the recovery of the same. Manifestly such a construction would not only be without the spirit but also without the letter of the statute and at variance with the numerous decisions heretofore cited.

The respondent submits that the principle of the Coronas case here controls and that the judgment in question should be affirmed.

Respectfully submitted,

PAUL G. SMITH,

JOHN R. GEYER,

Counsel for Respondent.

STATEMENT FILED BY SURVIVING PARENTS IN FIRST ACTION

John L. Koons and Malinda Koons *vs.* Philadelphia & Reading Railway Company.	In the Court of Common Pleas of Dauphin County. No. 410, June Term, 1916.

Plaintiff's Statement

This action is brought by the plaintiffs to recover damages from the defendant in the cause of action of which the following is a more specific statement.

(1) That on or about the 22d day of April, 1915, Lester M. Koons, a son of the plaintiffs, was employed by the said defendant Company in the capacity of a laborer in and about the railroad being operated by the said defendant between the City of Harrisburg and the City of Philadelphia, at a point near the City of Harrisburg, commonly known as the Rutherford Yards.

(2) That being thus employed the said Lester M. Koons was by the said defendant assigned under the charge, supervision and direction of one George Zimmerman, who was the person in charge of and directing the particular work in which he was engaged, and to whose orders the said Lester M. Koons was bound to conform, as were also the fellow-servants at the time working with him.

(3) That on the said day the said Lester M. Koons, being thus employed, was directed, with his fellow-servants, by the said George Zimmerman, to undertake the unloading of a certain freight car on which there were portions of another car which had been wrecked; he, the said George Zimmerman, superintending the work and directing the appliances to be used, and the manner of employing them, and the movements of the men.

(4) That it then and there became the duty of the said defendant to furnish to the said Lester M. Koons and his fellow-servants a reasonably safe place to work and reasonably safe and suitable appliances for the doing of the said work, and a manager, foreman or person in charge of the work, who should use due care in superintending the same, and in performing all the duties owing from the said defendant to the said Lester M. Koons and his fellow-servants, and who should use due care in giving orders and instructions to the said Lester M. Koons and his fellow-servants, and in furnishing to them the proper appliances.

(5) That its duties in the premises wholly disregarding, the said defendant, by its vice-principal, the said George Zimmerman, did order, instruct, and direct the said Lester M. Koons and his fellow-servants to undertake the work of unloading from the said car a large frame or portion of another car by means of a crane or tackle, and did then and there carelessly and negligently provide a certain appliance, to wit a chain with certain "dogs" or hooks attached to be used for the lifting of the said portion of a wrecked car from the other car, despite the fact that the said Lester M. Koons and his fellow-servants or either or certain of them, protested that the said appliance was not a proper appliance for the use contemplated, and was not safe, and despite the fact that another appliance, to wit certain chains which could be passed around the said material to be moved, were available, which were the better adapted for the purpose, and which they suggested should be used; but that thereupon the said defendant, by its vice-principal, the said George Zimmerman, did carelessly and negligently order, direct and instruct the said Lester M. Koons and his fellow-servants, to attach the said "dogs" or hooks, and did carelessly and negligently order that the material be thereby lifted and did carelessly and negligently order the said Lester M. Koons into a dangerous place, thus by his negligence created, to assist in so doing.

(6) That as a result of this carelessness and negligence, when the said part of a car came to be lifted, one of the "dogs" or hooks on the said chain slipped, thereby causing

the load to rapidly shift its position, or slip, striking the said Lester M. Koons upon the head, and causing his death within a short time thereafter.

(7) That the said Lester M. Koons was unmarried and without issue, and that during his life-time he performed numerous acts of service and assistance to the plaintiffs, his parents. That although over the age of twenty-one, he continued to perform these acts of service and assistance, and from time to time contributed for their aid, comfort and support large sums of money, and had he lived would from time to time, so long as he lived or they lived, or either of them lived, have continued to perform the said acts of service and assistance, and to contribute sums of money to them. That he was at the time of his death and shortly before, able to earn and did earn, large sums of money.

(8) That by reason of this wrongful conduct of the said defendant, they have been compelled to expend large sums of money in the payment of funeral and burial expenses and have lost his aid, comfort and assistance, as well as the sums which he from time to time contributed and would likely have contributed during the terms of their natural lives and the life of Lester M. Koons and the life of either of them. To recover all of which in the sum of Five Thousand ($5,000.00) Dollars, this action is brought.

(9) That said Lester M. Koons left to survive him no wife or issue, but parents, the plaintiffs, in whose name and for whose use this action is brought.

(10) And of all these matters and things the said plaintiffs demand trial by jury.

FOX & GEYER,
Attorneys for the Plaintiff.

STATE OF PENNSYLVANIA,
COUNTY OF DAUPHIN } *ss:*

Personally appeared before me, the undersigned, a Justice of the Peace in and for the State and County aforesaid, the above named John L. Koons and Malinda Koons, who

being duly sworn according to law, do depose and say that the facts in the foregoing statement set forth are true and correct.

JOHN L. KOONS,
MALINDA KOONS.

Sworn and subscribed to before me this 16th day of Sept., 1916.

JACOB H. BALSBAUGH, J. P.

My commission expires January 1, 1918.

ENDORSEMENTS

COURT OF COMMON PLEAS OF DAUPHIN CO., PA.

410 June Term, 1916.
John L. Koons and Malinda Koons

vs.

Philadelphia & Reading Railway Co.
Filed Sept. 19, 1916.

PLAINTIFF'S STATEMENT

To the within Defendant:

You are required to file an affidavit of defense to this statement of claim within fifteen days from the service hereof.

FOX & GEYER,
Attorneys for Plaintiff,
802 Kunkel Building,
Harrisburg, Pa.